No. 91-1600

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAZEN PAPER COMPANY, *et al.*,
Petitioners,

v.

WALTER F. BIGGINS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
HEIDI K. McAULIFFE
McGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

MONA C. ZEIBERG
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062

Attorney for Amicus Curiae The Chamber of Commerce of The United States of America

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* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The Equal Employment Advisory Council ("EEAC") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief *Amici Curiae* in support of Hazen Paper Co., *et al.*, the petitioners in this case. The written consents of all parties have been filed with the Clerk of this Court.

INTEREST OF THE *AMICI CURIAE*

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including over 250 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, aspects of EEO policies and requirements that apply to the employer-employee relationship.

Because of its interest in the application of the nation's employment laws, EEAC has filed over 120 briefs as *Amicus Curiae* before this Court, as well as over 180 other briefs before the United States Circuit Courts of Appeals and various state supreme courts. As part of this amicus activity, EEAC has participated as *Amicus Curiae* in cases involving the proper standard of proof required under the ADEA in order to recover liquidated damages in this Court. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *McLaughlin v. Richland Shoe*, 486 U.S. 128 (1988).

The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 200,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States

Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478 (1990); and *FMC v. Holliday*, 111 S.Ct. 403 (1990).

All of EEAC's members, the constituents of its trade association members, and many members of the Chamber are employers subject to the provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. Sec. 621 *et seq.*, and other various federal orders and regulations pertaining to nondiscriminatory employment practices and equal opportunity policies.

In the view of EEAC and the Chamber, the decision below improperly construes the standard for establishing a "willful" violation under the ADEA. This Court has held that the ADEA establishes a "two-tiered" liability scheme, and that a "willful" violation compelling a payment of liquidated damages cannot be found unless the plaintiff proves that the employer "knew" or acted with "reckless disregard" of whether its conduct violated the ADEA. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-128 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). In the instant case, however, the First Circuit virtually ignored this second tier, thus eliminating the plaintiff's obligation to show that the employer's misconduct reached a higher threshold, such as being outrageous or egregious. Instead, the First Circuit held that a "willful" violation could be

established by a mere showing that age was a "determining factor" in the employer's decision—the same level of proof the Circuit uses to find any disparate treatment violation of the ADEA. (Pet. App. at A-20).

This decision improperly collapses the ADEA's two-tiered system into one standard for showing both a disparate treatment case and a willful violation. Indeed, the court below recognized that under its approach, in many cases merely establishing a prima facie case would bring an automatic finding of a willful violation—"in many cases [a finding that age was a "determining factor"] will result in a willful violation following hard on the heels of an ADEA violation. . ." (Pet. App. at A-20).

As potential respondents to charges of discrimination filed pursuant to the ADEA and other employment statutes, the members of the EEAC and the Chamber are concerned that the decision below may automatically expose them to double liability in virtually every case where a theory of disparate treatment is alleged. Thus, EEAC members and Chamber of Commerce members have a direct interest in the issues presented for the Court's consideration in this case.

Because of their experience with these issues, both EEAC and the Chamber are well-suited to brief the Court on the importance of the issues beyond the immediate concerns of the parties to this case. This brief brings matter to the attention of the Court that has not already been provided by the party briefs.

STATEMENT OF THE CASE

The underlying facts of this case are set forth in detail in the petitioners' brief. The facts of particular relevance to the *Amici Curiae* are set forth below.

Respondent, Walter F. Biggins, who had been employed by petitioner, Hazen Paper Company, since 1977 as a technical director, was discharged in the summer of 1986. At the time of his discharge, Biggins was 62 years old and had worked for Hazen Paper for nine and one-half years. The Company's pension plan, which covered Biggins, provided that employees vested in the plan after ten years of employment.

During the course of Biggins' employment, he developed a new process, for which he sought and received a salary increase in 1983. The next year, Biggins again sought an increase in his salary from $44,000 to $100,000. When the Company objected, it touched off a dispute that would continue to rage throughout Biggins' employment.

In addition to the compensation dispute, the Company learned that Biggins was engaged in a private business venture, which, it concluded, posted a conflict of interest with regard to his duties to the Company. Hazen officials therefore attempted to negotiate a "confidentiality agreement" which would have restricted Biggins' outside activities during his employment. In addition, the agreement contained a two-year non-competition clause with no severance pay. Biggins refused to sign the agreement unless he was given a substantial raise. Upon his refusal to sign the agreement, Biggins was terminated on June 13, 1986. His pension benefits would have vested a short time later.

Hazen then hired a younger man to replace Biggins. This new employee was required to sign a confidentiality agreement that provided for 100 days of severance pay and a six-month non-competition clause.

A jury found that Hazen Paper Company violated the anti-discrimination provisions of the ADEA and that the violation was "willful," thereby subjecting the Company to additional liquidated damages under the statute. (Pet. App. at A-6).[1] The district court granted the Company's motion for a judgment notwithstanding the verdict on the jury's finding that the violation was willful.

On appeal, the First Circuit Court of Appeals vacated the district court's JNOV order on the willfulness issue and reinstated the jury's liquidated damages award. (Pet. App. at A-15). The First Circuit recognized this Court's rule that a violation of the ADEA is not "willful" unless the plaintiff can show that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (Pet. App. at A-15, citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-28 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 128, 133 (1988)). But the court held that this standard was fulfilled if the plaintiff could establish that age was the "determining factor" in the employer's decision. (Pet. App. at A-20, 21).

The court refused to follow other circuits that have ruled that the employer's conduct must be "egregious" or "outrageous" in order to be found willful, even though it recognized that its lesser standard would result in a violation in many cases where only a mini-

[1] Citations to the Petitioners' Appendix are designated as (Pet. App. at ——).

mal showing of disparate treatment had been established. (Pet. App. at A-20). Applying this standard to the instant case, the First Circuit found "strong evidence" of a willful violation in a company official's statement that he was absolutely aware that age discrimination was illegal. (Pet. App. at A-20). The court further noted that Biggins was discharged shortly before he would meet the ten-year service requirement for pension vesting. (Pet. App. at A-23).

SUMMARY OF ARGUMENT

By holding that a willful violation of the Age Discrimination in Employment Act may be established by a mere showing that age was the determining factor in the employer's decision, the First Circuit directly contravenes this Court's decisions in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988). The facts of this case comport squarely with those in *Richland Shoe* and should be guided by this Court's analysis in *Thurston* and *Richland Shoe*. *Thurston*'s express rejection of the broad "in the picture" standard, which rejection was later upheld in *Richland Shoe*, should have guided the First Circuit to find that "willfulness" cannot be based upon the mere admission that the employer was aware that age discrimination is illegal. *Richland Shoe*, 486 U.S. at 133 n.9. In reversing the First Circuit's decision, this Court should clarify the definition of *Thurston*'s "knew or showed reckless disregard" requirement by holding that additional proof of outrageous or egregious conduct is necessary to support a finding of willfulness.

That Congress provided for liquidated damages under the ADEA's enforcement scheme "only in in-

stances of willful violations" clearly indicates that *more* than a mere showing that age was "the determining factor" in an employment decision is required before liquidated damages may be assessed. "Willfulness" under the two-tiered liability scheme requires more than merely proving a disparate (i.e., intentional) treatment violation under the standards of *McDonnell Douglas v. Green*, 411 U.S. 792 (1972) to demonstrate that the employer knew it's conduct violated the Act. To prove willfulness, the plaintiff must make an *additional* showing of conduct on the part of the employer that is more culpable. Indeed, if *Thurston* is so limited that a routine finding of a disparate treatment violation means that the employer acted "knowingly" or "recklessly," then the *Thurston* standard must be modified to require additional evidence of egregious or outrageous conduct in disparate treatment cases, as argued in the employer's brief.

The decisions of the Third and the Fifth Circuits in *Dreyer v. Arco Chemical Corp.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 480 U.S. 906 (1987), and *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989) correctly interpet *Thurston*'s "knew or showed reckless disregard" standard as requiring a demonstration of outrageousness or egregiousness on the part of the employer –before a finding of willfulness can be made. These decisions are consistent with the Congressional purpose of awarding liquidated damages only against defendants who consciously violate the Act and with this Court's warning that willfulness cannot be based upon facts which harken back to the "in the picture" standard. Moreover, because this Court's standard requires proof in addition to that required to substantiate the

underlying violation, it is consistent with the plain language of the Act's enforcement provision and its legislative history. As such, the "outrageousness" or "egregiousness" requirement to prove a willful violation clearly preserves the two-tiered liability structure for "willful" and "non-willful" violations of the Act.

The decisions of lower courts that have construed the *Thurston* "knew or showed reckless disregard" test to require a showing of less than outrageous or egregious conduct have failed to preserve the ADEA's two-tiered liability framework. Just as this Court forewarned in *Thurston*, these decisions have resulted in the virtual automatic award of liquidated damages in age discrimination cases. Failure to reverse the lower court's decision in this case will throw age cases back to the discredited *Jiffy June* test rejected by this Court, thereby collapsing the ADEA's double-tiered standard into a single standard which assesses liquidated damages based upon a statement by the employer that he or she was aware that the Age Act prohibits age discrimination.

Finally, no inference of age discrimination arises just because when Biggins was discharged, he was 62 years old and his 10-year service requirement for pension vesting would have occurred shortly after his discharge. Service, not age, is the operative factor. If Biggins had started work at age 19, rather than age 52, the issue would not even arise. In any event, service cannot be used as a proxy for age, and the courts have ruled that the juxtaposition of a discharge decision and the date for minimum pension vesting is insufficient to prove age discrimination. *Visser v. Packer Engineering Associates*, 924 F.2d 655, 658 (9th Cir. 1991); *Pickering v. USX Corp.*, 758 F. Supp. 1460, 1462 (D. Ut. 1990).

ARGUMENT

I. THE LOWER COURT'S HOLDING IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *THURSTON* AND *RICHLAND SHOE* AND HAS THE EFFECT OF REVITALIZING THE *JIFFY JUNE* "IN THE PICTURE" STANDARD FOR THE ASSESSMENT OF LIQUIDATED DAMAGES THAT WAS EXPRESSLY OVERRULED IN *RICHLAND SHOE*

The Court Appeals below erred in holding that a "willful" violation of the ADEA may be established by a mere showing that age was a "determining factor" in the employer's decision. (Pet. App. at A-20). This holding directly contravenes this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 125 (1985), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), and attempts to push the law back to the "in the picture" standard of willfulness under the ADEA that was expressly rejected in *Richland Shoe*. The practical result of such a holding would be to nullify the ADEA's two-tiered structure of liability, and to render double damages automatic in virtually every case.

The ADEA, which prohibits discrimination in the workplace based upon age, Section 4(a), 29 U.S.C. Section 623(a), is enforced in accordance with the procedures provided under the Fair Labor Standards Act (FLSA), 29 U.S.C. Sections 201, *et seq.*, with certain notable exceptions. Pursuant to Section 7(b) of the Act,[2] liquidated damages are available to successful plaintiffs "only in cases of willful violations of this chapter." 29 U.S.C. Section 626(b). Thus, it is clear that Congress, by restricting liquidated damages under the ADEA to "willful" violations of the Act, intended in plain statutory language to limit the awarding of liquidated damages in ADEA cases.

In *Thurston*, a case which challenged the application of a company-wide plan under the ADEA, this Court interpreted Section 7(b) to require proof that "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S. at 126. The Supreme Court's examination of the legislative history of the Act revealed that Congress intended for liquidated damages to be punitive in nature.[3] *Id.* Since the

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[2] Section 7(b) provides in relevant part:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter.* In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation. (Emphasis added).

[3] The legislative history of the ADEA liquidated damages provision evidences the intent of its sponsor and Congress to limit the award of liquidated damages only to cases where employer actions are even more egregious or outrageous than those which characterize routine liability. As originally pro-

liquidated damages provision was substituted for [FLSA's] criminal penalties at Senator Javits' request, the Court reasoned that such damages were intended to provide a deterrent effect to future willful violations. *Id.*

Furthermore, the structure of the statute convinced the Court that Congress intended to provide for a two-tiered scheme of liability. *Id.* at 128. The *first* tier was designed to address non-willful liability. The *second* tier, that affords liquidated damages for willful violations, addresses those instances where the employer's actions are exceptionally serious to merit additional sanctions. As such, the Court noted that liquidated damages were not intended to be awarded in every case. *Id.*

Moreover, in *Thurston*, this Court expressly rejected the widely used "in the picture" test established in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972), which held that a violation is willful if the employer knew that the ADEA was "in the picture." *Thurston*, 469 U.S. at 128. Such a "broad" standard, this Court stated, would surely result in double damages in virtually every case. *Id.* Recognizing that the ADEA requires employers to post notices of the Act, the Court realized that it is virtually impossible for employers to be unaware that the ADEA is "in the picture." *Id.*

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posed, the ADEA would have incorporated criminal penalties. 113 Cong. Rec. 2199 (1967). The substitution of the "willful" standard for liquidated damages was designed to serve the same purposes of deterring and punishing violators as the criminal provision would have served. *See* 113 Cong. Rec. 7076 (remarks of Senator Javits). *See also Thurston*, 469 U.S. at 125-126.

Three years later, upon re-examination of the liquidated damages provision contained in the Fair Labor Standards Act, this Court again rejected the "in the picture" test as the definition of willfulness, noting that it was not supported by the plain language of the Act. *McLaughlin v. Richland Shoe*, 486 U.S. at 134. The *Richland Shoe* opinion criticized the "in the picture" test of willfulness, noting that it "virtually obliterates any distinction between willful and nonwillful violations." *Id.* at 132-133. Thus, the *Richland Shoe* Court reaffirmed the *Thurston* analysis and embraced the ADEA's "knew or showed reckless disregard" standard as a uniform construction of the term "willfulness."

Thus, it would be contrary to the ADEA's burden of proof structure to allow a basic, *prima facie* showing of disparate treatment to be sufficient to demonstrate that the employer's conduct was "willful." Some courts have expressed puzzlement that an act of "intentional" discrimination could somehow not be "knowing" or "willful." The answer, however, can be analyzed as follows.

Thurston says that to be "willful", the employer either "knew" or "acted with reckless disregard" of whether its conduct violated the Act. The first prong —actual knowledge—is akin to a "smoking gun" where the evidence shows that the employer had actual knowledge that its conduct violated the Act and acted anyway. To prove that the employer knowingly violated the ADEA, the plaintiff cannot simply show that the employer was aware of the ADEA or that a disparate treatment claim has been established. No knowing violation has been proven here. The second prong looks to whether the employer acted with "reckless disregard." Again, to have a "two-tiered"

scheme in the context of this Court's burden of proof decisions, a "knowing" or "reckless" decision must be more than a finding that the employer committed an "intentional" discrimination as that "term of art" is used in employment discrimination cases.

In employment discrimination law, "intentional" discrimination can mean any case that is not a disparate impact case. As such, it applies to almost every individual discrimination suit. Where there is no direct evidence of age discrimination, the courts use the burden of proof construct established by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See generally*, *Thurston*, 469 U.S. at 121. Using this standard to prove intentional (i.e., disparate treatment) discrimination does not mean that there was proof that the employer intended to violate the law. To the contrary, this scheme orders the relative proof burdens to determine whether discrimination can be inferred in the *absence of* such direct evidence of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-57 (1981). Indeed, the plaintiff's "burden of establishing a prima facie case of disparate treatment is not onerous." *Id.* at 253.

In a case such as here, once the plaintiff meets the initial burden, the employer must come forward with a legitimate, nondiscriminatory reason for its conduct, and the plaintiff can attempt to prove that the employer's stated reasons are pretextual. The jury then weighs all the evidence (which will be close in many cases) and decides whether a disparate treatment case can be found. This will be the burden of proof scheme in *every* disparate treatment case, and if *any* violation under this scheme is sufficient also to prove that the employer "knowingly" or "willfully" violated the Act, then *every* violation will be "willful"—a clear

misapplication of the *Thurston* standard. Indeed, it would be ironic and illogical to use a two-tiered system in *Thurston* where the employer's policy was "discriminatory on its face" (469 U.S. at 121), and then to allow a finding of "willfulness" in a balancing-of-the-evidence, *McDonnell Douglas* type case where there is no such direct evidence of age discrimination.

We concur with the employer's arguments that if the *Thurston* standard means that any finding of "intentional" discrimination means that the employer's conduct was a "knowing" violation, then the *Thurston* standard will have to be modified to allow for a two-tiered system in disparate treatment cases. If *Thurston* is so limited, then, as the employer argues, something more must be shown than that the employer simply knew or showed reckless disregard that its conduct violated the ADEA. Thus, any formulation of the definition of "willfulness" must require that in addition to a basic disparate treatment finding, the employer's conduct must in some *further* sense have been outrageous or egregious, such as where there is "smoking gun" evidence, or where the employer has routinely or repeatedly discriminated against older persons through a pattern of oppressive treatment.

II. THE MAJORITY OF THE COURTS OF APPEALS HAVE CORRECTLY INTERPRETED *THURSTON*'S "KNEW OR SHOWED RECKLESS DISREGARD" TEST OF WILLFULNESS TO REQUIRE CONDUCT ON THE PART OF THE EMPLOYER THAT IS "OUTRAGEOUS" OR "EGREGIOUS"

In accordance with this Court's reasoning in *Thurston* and *Richland Shoe*, several lower courts have correctly interpreted the "knew or showed reckless disregard" language of *Thurston*'s willfulness test to

require more evidence than the mere admission that the employer was "aware that age discrimination was illegal." In fact, several courts properly require evidence of outrageous or egregious conduct. In keeping with *Thurston* and *Richland Shoe*'s mandate to preserve the two-tiered liability system, such a standard best maintains the distinction between non-willful and willful violations. In addition, such a standard is consistent with the *Thurston* Court's statement that liquidated damages are "punitive in nature" and should be assessed in limited circumstances. *Thurston*, 469 U.S. at 125.

In *Dreyer v. Arco Chemical Corp.*, 801 F.2d at 657, for example, the Third Circuit interpreted the *Thurston* "knew or showed reckless disregard" standard to require a proof that the employer's conduct was "outrageous."[4] Reasoning that the essence of liquidated damages is punishment for "conduct that is outrageous," the Third Circuit held that outrageous conduct on the part of the employer should satisfy the "knew or showed reckless disregard" test for liquidated damages set forth in *Thurston* and *Richland Shoe*. *Id.* at 657-658. *See also Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989); *Kelly v. Matlack, Inc.*, 903 F.2d 978 (3d Cir. 1990); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 346 (3d Cir. 1990) ("There must be 'some additional evidence of outrageous conduct' that distinguishes this from the ordinary, though still reprehensible, case of age discrimination"); and *Bruno v. W.B. Saunders Co.*, 882 F.2d 760 (3d Cir.), *cert. denied*, 110 S.Ct. 980 (1989).

[4] In *Dreyer*, the plaintiffs were terminated in a reduction of force in which the plaintiffs' department was reduced from 26 employees to eighteen employees. 801 F.2d at 652-653. A jury found that their terminations were both intentional and willful. *Id.*

The Fifth Circuit, moreover, has fashioned a similar test. In *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989), the court noted that the Supreme Court has held that liquidated damages are a serious sanction and should be reserved for the most "egregious" violations where the defendant acted "knowingly *and* recklessly." Thus, the Fifth Circuit requires a showing of egregiousness on the part of the employer in order to trigger liquidated damages under the ADEA. *Id.*

Even those circuits which do not explicitly require an element of outrageousness or egregiousness do require evidence that approaches the higher threshold of these standards. For instance, the Fourth Circuit, in applying the "knew or showed reckless disregard" test, noted *Dreyer*'s rule requiring outrageous conduct and agreed that something more than "a retrospective finding that there was a simple violation of the statute for proof of willfulness" was required. *Gilliam v. Armtex, Inc.*, 820 F.2d 1387, 1390 (4th Cir. 1987). *See also Taylor v. Home Insurance Company*, 777 F.2d 849 (4th Cir.), *cert. denied*, 476 U.S. 1142 (1985).

The Eighth Circuit also requires more than just evidence of age-based bias in order to trigger an award of liquidated damages. *See Beshears v. Asbill*, 930 F.2d 1348, 1356 (8th Cir. 1991). The Eighth Circuit will uphold a finding of willfulness "if the people making the employment decision know that age discrimination is unlawful, *and* if there is *direct evidence*—more than just an inference from, say

an arguably pretextual justification—of age-based animus, the trier of fact may properly find willfulness." *Id.* (emphasis added). *See also Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989).

These cases illustrate that the ADEA's two-tiered liability standard requires a test which makes a realistic distinction between a non-willful violation and a willful violation. The standard articulated by the Third and the Fifth Circuits, a requirement of some element of outrageous or egregiousness on the part of the employer, is consistent with this Court's teachings of *Thurston* and *Richland Shoe*. In keeping with Congress's directive that the Act create a two-tiered liability scheme, the "outrageous" or "egregious" standard will ensure that an award of liquidated damages be based on evidence that does not merely duplicate that needed for make-whole relief. *Dreyer*, 801 F.2d at 658. Moreover, a definition of "knew or showed reckless disregard" which requires a showing of outrageousness or egregiousness will prevent a harkening back to the *Jiffy June* standard, which permitted liquidated damages merely because the employer was aware that age discrimination was illegal. Thus, in accordance with the dictates of *Thurston* and *Richland Shoe*, the "outrageous" or "egregious" test successfully maintains a second tier of liability that is based upon the more culpable nature of the employer's conduct. *See Thurston*, 469 U.S. at 125; *Richland Shoe*, 486 U.S. at 132-133.

III. A LESSER STANDARD THAN THAT REQUIRING "OUTRAGEOUSNESS" OR "EGREGIOUSNESS" HAS THE PRACTICAL EFFECT OF COLLAPSING THE ADEA'S TWO-TIERED SYSTEM INTO ONE STANDARD FOR BOTH "WILLFUL" AND "NON-WILLFUL" VIOLATIONS

A willfulness test that requires no more than a showing that the employer knew that age discrimination was prohibited by law contravenes this Court's decisions in *Thurston* and *Richland Shoe*. Furthermore, a standard that fails to raise the level of prohibited conduct up to "egregiousness" or "outrageousness" will not serve to make realistic distinctions between non-willful liability and willful liability, but instead will make it virtually impossible for juries to distinguish between the two. Lower courts that interpret the "reckless disregard" standard in such a manner have effectively obliterated the ADEA's two-tiered system of liability and have equated non-willful and willful violations. No better example could be found than in the decision of the First Circuit below. After adopting its "determining factor" standard, the court stated:

> We now apply the standard to this case. The principal owner of the company, Thomas Hazen, testified that he was "absolutely" aware that age discrimination was illegal. *This is as strong evidence of a knowing violation of ADEA as a plaintiff could wish.*

(Pet. App. at A-20) (emphasis added). Thus, in the First Circuit's view, it is sufficient that the employer be aware of the ADEA in order for conduct to be willful.

Such a standard is exactly what was rejected in *Richland Shoe*, where this Court used the following

fact situation from the district court's opinion as the example of how the courts had *incorrectly* applied the willfulness standard:

> "The [company official] was aware that the FLSA existed and that it governed overtime systems such as that used for the Richland mechanics. . . . Thus, although [he] did not state that he thought that the system used was contrary to the provisions of the FLSA, *he did state that he knew that the FLSA applied. I believe that this admission is sufficient to satisfy the liberal willfulness requirement of the FLSA.*" Donovan v. Richland Shoe Co., 623 F.Supp. 667, 671 (E.D. Pa. 1985).

Richland Shoe, 486 U.S. at 133 n.9 (emphasis added). Clearly, then, the court below was incorrect when it applied the "determining factor" test to mean that the employer had acted recklessly just because its officer knew that the ADEA applied to its operations.

The tendency of some lower courts to eviscerate this Court's "reckless disregard" standard is further illustrated by the Eleventh Circuit's decisions in *Lindsey v. American Cast Iron Pipe Co. (ACIPCO)*, 810 F.2d 1094 (11th Cir. 1987), and *Formby v. Farmers & Merchants Bank*, 904 F.2d 627 (11th Cir. 1990). In *Lindsey*, the plaintiff alleged that his employer failed to promote him because of his age. *Id.* at 1096. The Eleventh Circuit found that the employer "willfully" violated the ADEA based upon the admission that ACIPCO knew that the ADEA barred employment decisions based upon age. *Id.* at 1101.

Applying the same analysis in *Formby*, the court upheld a finding of willfulness premised on evidence that the jury did not believe the employer's explanation with regard to the plaintiff's discharge and *was*

aware that the ADEA prohibited discrimination on the basis of age. Formby, 904 F.2d at 632. As demonstrated by these two cases, there is no practical difference between the standard applied by the Eleventh Circuit and the *Jiffy June* "in the picture" standard that was criticized and abolished in *Thurston* and *Richland Shoe*. Thus, the Eleventh Circuit's failure to interpret "reckless disregard" as requiring conduct more culpable or egregious has resulted in the same standard under the Age Act for non-willful and willful violations that was abolished by *Richland Shoe*.[5]

In disparate treatment actions, such as the cases discussed above and this case, the approaches outlined above have resulted in the nearly automatic imposition of liquidated damages where a violation of the Act is found. Clearly, this result is in direct conflict with the ADEA's two-tiered liability standard. *See Thurston*, 469 U.S. at 128; *Richland Shoe*, 486 U.S. at 132-133.

IV. THE MERE PROXIMITY OF PLAINTIFF'S PENSION VESTING DATE IS NOT EVIDENCE THAT HIS AGE WAS A FACTOR IN HIS DISCHARGE

As shown above, the court below improperly made a garden-variety disparate treatment finding into a "willful" violation. The First Circuit made another serious error when it leaped to the presumption that

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[5] This point is aptly illustrated by one commentator's observation that liquidated damage awards have been upheld in virtually every case decided by the 11th Circuit. Ennis & Kelly, *The Standards for Awarding Liquidated Damages under the Age Discrimination in Employment Act—A Need for Uniformity*, 17 Employee Relations L. J. 237, 238 (Autumn 1991).

age was a factor in Biggins' discharge merely because he was approaching the vesting date of his pension rights. The court stated: "If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting" (Pet. App. at A-14). Put in those terms, an inference of age discrimination would arise whenever an employer took an adverse employment action against any employee age 40 or older who had worked long enough to approach the vesting date. Such a result, however, is insupportable. For example, if Biggins had started working for the employer at age 19, his pension would have vested at age 29. His age, therefore, comes into play only in the sense that he started working at age 52 and was 62 years old ten years later. Age *per se* however, had no bearing on his pension eligibility, and at best is a factual coincidence that of itself is not probative of age discrimination.

As the courts have held, the mere juxtaposition of a discharge decision alongside the employee's proximity to pension vesting is insufficient to support an inference of age discrimination. *Harvey v. I.T.W., Inc.*, 672 F. Supp. 973, 975 (W.D. Ky. 1987). And even assuming that the company officials are aware of the proximity of these two events:

> a trier of fact may not infer action from knowledge alone. Otherwise every worker who lost his job within months, or perhaps years, before the full vesting of his pension would have a prima facie case of age discrimination.

Visser v. Packer Engineering Asosciates, Inc., 924 F.2d 655, 658 (9th Cir. 1991). *See also Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 390 (3d Cir. 1990) ("Nor can we turn the company's decision to lay off employees during economic difficulties into an intention to violate ERISA").

In addition, no inference of age discrimination can arise just because Biggins would reach a certain age (here age 62) when he would have been working for ten years—the minimum vesting requirement. The operative standards have been spelled out as follows:

> Even assuming *arguendo* the defendants terminated [the plaintiff] to prevent his pension rights from fully vesting, this would not be probative of age discrimination since it goes to tenure with the company, not age. A young person who has been with the company for a long time may very well be closer to a fully vested pension than an older person who just started work there recently.

Harvey v. I.T.W., Inc., 672 F. Supp. at 975. Plaintiff's age and his vesting date thus were improperly linked to raise an inference of age discrimination:

> Plaintiffs' protestations that age and pension eligibility are "inexorably linked" are belied by the actual terms of the pension plan in this case. [Record reference omitted]. As is true of most pension plans, years of service—rather than age —is the primary factor in determining benefits eligibility. *Absent some specific evidence of disparate treatment on the basis of age*, the mere fact that older employees may have had more years of service than younger employees does not automatically convert the alleged pension benefits discrimination into age discrimination.

Pickering v. USX Corp., 758 F. Supp. at 1462.[6]

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[6] *White v. Westinghouse*, 862 F.2d 56 (3d Cir. 1988) is inapplicable to the instant case. The Third Circuit held that the district court improperly granted the employer's motion for summary judgment on the issue of whether White was discharged as a pretext for avoiding two additional years of pension benefits. The Third Circuit noted that "White alleges that his numerous requests to extend his termination date to

As set forth fully in the petitioners' brief, there is no direct or circumstantial evidence that "pension costs played a role in the decision to fire" Biggins. *Visser v. Packer Engineering Associates*, 924 F.2d at 658. The conclusory statement of the plaintiff that he was discharged to avoid his pension vesting is not sufficient to support the plaintiff's case. *Harvey v. I.T.W.*, 672 F. Supp. at 975.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully submit that the First Circuit's decision should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
HEIDI K. MCAULIFFE
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

MONA C. ZEIBERG
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
Attorney for Amicus Curiae The Chamber of Commerce of The United States of America

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* Counsel of Record

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allow completion of 30 years of service were either ignored or denied." White was not discharged for cause as was Biggins, but rather was terminated during a reduction in force at 29¾ years of service. The Third Circuit did not decide that the employer had committed age discrimination, but rather ordered the case to trial on this issue. As the Seventh Circuit has noted in "declin[ing] to rule that pension considerations always operate [as a proxy for age]," this issue "should be examined on a case-by-case basis." *Wheeldon v. Monon Corp.*, 946 F.2d 533, 536 (7th Cir. 1991).